No. 06-516

Supreme Court, U.S.
FILED
JAN 5 - 2007
OFFICE OF THE CLERK

In The Supreme Court of the United States

**DWAYNE ROSS, MARIA ROSS,
Individually and as Next Friends of
SYDNEY ROSS and JOHNATHON ROSS, Minor Children;
SYDNEY ROSS, Minor Child;
JOHNATHON ROSS, Minor Child,**

Petitioners,

v.

**ALLSTATE TEXAS LLOYDS
INSURANCE COMPANY,**

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

REPLY TO BRIEF IN OPPOSITION

THE HALL LAW FIRM
Benjamin L. Hall III
530 Lovett Boulevard
Houston, Texas 77006
Telephone 713.942.9600
Facsimile 713.942.9566

THE HOLMAN LAW FIRM, P.C.
David W. Holman
24 Greenway Plaza, Suite 2000
Houston, Texas 77046
Telephone 713.623.2550
Facsimile 713.623.2793

Counsel of Record for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

Page

REASONS TO GRANT THE PETITION 1

I. The Bench And Bar Need Clear Guidelines About What Constitutes Intervention As A Matter of Right. 1

II. There Is A Direct And Irreconcilable Conflict Among The Lower Courts About Whether An Insurer Can Intervene In An Action Against Its Insured To Protect Its Coverage Interests. 3

III. Allstate's So-Called "Practical Reasons" To Intervene Are Insufficient To Justify Intervention As A Matter Of Right. 7

A. Allstate forsook its "contractual interests" when it breached its duty to defend its insured from the judgment. 7

B. Allstate's "coverage interests" are insufficient to warrant intervention because they are contingent on the resolution of a separate suit. 8

Table of Contents (continued)

Page

C. Allstate's additional expenses or inconvenience is insufficient to warrant intervention as of right. 8

D. Negligence played no role in this case. 9

IV. The Fifth Circuit's Opinion Represents Unsound Policy. 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases **Page(s)**

Bituminous Casualty Corp. v. Garcia,
223 F.R.D. 308 (N.D. Tex. 2004) 4

Blake v. Pallan,
554 F.2d 947 (9th Cir. 1977) 9

Bolden v. O'Connor Café of Worcester, Inc.,
50 Mass. App. Ct. 56, 734 N.E.2d 726 (Mass. App. 2000) 4, 6

Bridge v. Air Quality Tech. Serv., Inc.,
194 F.R.D. 3 (D. Me. 1999) 4

Cascade Natural Gas Corp. v. El Paso Natural Gas Co.,
386 U.S. 129 (1967) 1, 2

Commercial Casualty Ins. Co. v. Fruin-Colnon Contracting Co.,
32 F.2d 425 (8th Cir. 1929) 7

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469 (1975) 2

Donaldson v. United States,
400 U.S. 517 (1971) 1

Evans v. Eaton,
20 U.S. 356 (1822) 2

Table of Authorities (continued)

Cases **Page(s)**

Gibbons-Markey v. Texas Medical Liability Trust,
163 Fed. Appx. 342, at *4 (5th Cir. 2006) 7

H.B.H. v. State Farm Fire & Casualty Co.,
170 Ariz. 324, 823 P.2d 1332 (Ariz. App. 1991) 4

Ideal Mut. Insurance Co. v. Myers,
789 F.2d 1196 (5th Cir. 1986) 8

In re Lumbermens Mut. Cas. Co.,
184 S.W.3d 718 (Tex. 2006) 4

Kelley v. Pascal System, Inc.,
183 F.Supp. 775 (E.D. Ky. 1960) 4

Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder,
72 F.3d 361 (3d Cir. 1995) 3

Nieto v. Kapoor,
61 F.Supp.2d 1177 (D.N.M. 1999) 4

O'Bannon v. Northern Petrochemical Co.,
113 Ill. App. 3d 734 (Ill. App. Ct. 1983) 4

Pacific Coast Casualty Co. v. General Bonding & Casualty Ins. Co.,
240 F. 36 (9th Cir. 1917) 7

Public Serv. Corp. of New Hampshire v. Patch,
136 F.3d 197 (1st Cir. 1998) 3

Table of Authorities (continued)

Cases **Page(s)**

Restor-A-Dent Dental Labs, Inc. v. Certified Alloy Prods., Inc.,
725 F.2d 871 (2d Cir. 1984) 4-6

SEC v. Everest Management Corp.,
475 F.2d 1236 (2d Cir. 1972) 9

Smuck v. Hobson,
408 F.2d 175 (D.C. Cir. 1969) 3

State Farm Fire and Cas. Co. v. Taylor,
706 S.W.2d 352 (Tex. App.—Fort Worth 1986,
writ ref'd n.r.e.) 4

Travelers Indem. Co. v. Dingwell,
884 F.2d 629 (1st Cir. 1989) 4-6, 8

Vermejo Park Corp. v. Kaiser Coal Corp.,
998 F.2d 783 (10th Cir. 1993) 6

Waffle House, Inc. v. Travelers Indemnity Co. of Illinois,
114 S.W.3d 601 (Tex. App.—Fort Worth 2003,
pet. denied) 7

Rules

FED. R. CIV. P. 24 2

Table of Authorities (continued)

Cases **Page(s)**

Shapiro, David L.,
Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 HARV. L. REV. 721 (February, 1968) 1

Wright, Charles A., Arthur R. Miller, Mary Kay Kane,
7C FEDERAL PRACTICE & PROCEDURE §1908 (2006) 1, 3, 9

Petitioners file this brief in reply to the Brief in Opposition filed by Respondent, Allstate Texas Lloyd Insurance Company ("Allstate"), and in support of their request that this Court grant this petition for writ of certiorari.

REASONS TO GRANT THE PETITION

I. The Bench And Bar Need Clear Guidelines About What Constitutes Intervention As A Matter of Right.

This Court should grant this petition to clarify the confusion in the courts over the proper construction of intervention as a matter of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure. This Court has not discussed that rule in over forty years. In the two decisions in which the Court did discuss the rule, the Court contributed to the confusion.[1] This case presents the questions on the construction of Rule 24(a)(2) in sharp relief against a background of a straightforward record.

In this case, Allstate refused to post a supersedeas bond[2] to protect its insured's assets from execution while its insured's appeal from the judgment was pending. For that reason, its insured, Kent Mathews, fired the attorneys that Allstate hired to defend him, entered into a deal with the Plaintiffs to protect his assets and dismissed his appeal from the judgment. Allstate, to "protect its monetary interest in the case" filed a post-judgment motion to intervene (CR 2845).

---

[1] Leading commentators note that the *El Paso* opinion "adds confusion in the field of intervention" and that courts and commentators refuse to regard it as "significant precedent," while the *Donaldson* opinion "also has its perplexing qualities." *See* Charles A. Wright, Arthur R. Miller, Mary Kay Kane, 7C FEDERAL PRACTICE & PROCEDURE §1908 (2006) (hereafter "Wright & Miller"); David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721, 730 (February, 1968); *see also Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967); *Donaldson v. United States*, 400 U.S. 517 (1971).

[2] The judgment was for over $10 million. Allstate attempted to post a supersedeas bond for $300,000. The district court denied this insufficient security. Allstate has not challenged that denial on appeal. Thus, there was no supersedeas bond in place to protect Kent Mathews' assets from execution while he pursued an appeal. It was for that reason that he entered into the best deal he could get with the Plaintiffs.

Allstate sought to protect its coverage interests – interests that were already being preserved in the separate suit that Allstate had filed against Kent Mathews. The district court denied Allstate's untimely motion to intervene. The Fifth Circuit held that the district court was required to grant Allstate's motion to intervene **as a matter of right**[3] under Rule 24(a)(2). *See* FED. R. CIV. P. 24(a)(2).

Allstate argues that the construction of Rule 24(a)(2) should be "elastic," and "flexible," and "liberal," and "practical." The question presented here is how far does the rule stretch. Obviously, the rule is not so "elastic" that it stretches to cover every situation. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 500 (1975) ("Of course, no rule of law is infinitely elastic.").[4] As Mr. Justice Washington said long ago when discussing a similar argument that a patent could be construed to cover any and all things:

> [The argument is] that it may have a sort of elastic ambiguity, capable of contraction if not expansion, so as to adapt itself to whatever may be found convenient at any given time to embrace. This is against all settled principles; it is against good policy; and it is against the words and the spirit of the act of Congress.

Evans v. Eaton, 20 U.S. 356, 394 (1822).

Here, the central question is whether Allstate had an interest sufficient to require its intervention as a matter of

---

[3] Allstate did not seek permissive intervention under FED. R. CIV. P. 24(b).

[4] *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 134 (1967) ("We therefore know that some elasticity was injected and the question is, how much.").

right.[5] However, there is no clear definition of what that interest is. As the leading commentators state, "[t]here is not as yet any clear definition, either from the Supreme Court or from lower courts, of the nature of the 'interest relating to the property or transaction which is the subject of action' that is required for intervention of right."[6] Clearly, the required interest cannot be some "undifferentiated, generalized interest" for that would be "too porous a foundation on which to premise intervention as of right." *See Public Serv. Corp. of New Hampshire v. Patch*, 136 F.3d 197, 205 (1st Cir. 1998). And, equally clearly, the rule does not provide "carte blanche intervention by anyone at any time." *See Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969). But, beyond that, courts have little guidance on how to define the nature of the interest required for intervention as of right. *See Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder*, 72 F.3d 361, 366 (3d Cir. 1995) ("[T]he precise nature of the interest required to intervene as of right has eluded precise and authoritative definition.").

This case gives the Court the unique opportunity to clearly define the nature of the interest required for intervention as a matter of right. As demonstrated by the conflicts among the Circuits, such guidance is not just helpful, but necessary.

II. There Is A Direct And Irreconcilable Conflict Among The Lower Courts About Whether An Insurer Can Intervene In An Action Against Its Insured To Protect Its Coverage Interests.

Both the Fifth Circuit below and Allstate in its brief tried to minimize the direct and irreconcilable conflict between the holding below and the opinions of other courts. There are legions of cases that hold that an insurer cannot intervene as a matter of right in a case against its insured so as

---

[5] Allstate says that this is the only question. It is not. As can be seen by the questions presented, an unbriefed issue is whether Allstate's post-judgment motion to intervene was "timely" – another requirement of Rule 24.

[6] Wright & Miller, *supra* n.1, at §1908.

to avoid coverage.[7] In fact, even cases that pre-dated the 1966 amendments held that a liability insurer could not intervene in an action against its insured in order to protect its coverage interests.[8] On the other hand, prior to this opinion, there were no cases that held that an insurer can intervene post-judgment to appeal a judgment against its insured in order to minimize the insurer's own liability under the policy.[9] The cases that Allstate cited to support its position involve insureds attempting to intervene in an insurer's declaratory judgment action,[10] an insurer intervening to challenge a settlement,[11] and a case that actually holds that an insurer cannot intervene as of right to contest the insured's liability.[12]

Two cases from other Circuits are in direct and irreconcilable conflict with the Fifth Circuit's opinion below. The first is *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629 (1st Cir. 1989). In that case, Dingwell's plant was sued for

---

[7] *See, e.g., Travelers Indem. Co. v. Dingwell*, 884 F.2d 629 (1st Cir. 1989); *Restor-A-Dent Dental Labs, Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d 871 (2d Cir. 1984); *Nieto v. Kapoor*, 61 F.Supp.2d 1177 (D.N.M. 1999); *Bolden v. O'Connor Café of Worcester, Inc.*, 50 Mass. App. Ct. 56, 69, 734 N.E.2d 726, 737 (Mass. App. 2000); *State Farm Fire and Cas. Co. v. Taylor*, 706 S.W.2d 352, 352-53 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.); *O'Bannon v. Northern Petrochemical Co.*, 113 Ill. App. 3d 734, 737-738 (Ill. App. Ct. 1983).

[8] *See Kelley v. Pascal System, Inc.*, 183 F.Supp. 775, 777 (E.D. Ky. 1960) ("The liability of the insurance company is only potential and may never arise even though the liability of the insured is fixed in this action.").

[9] Relying on the Fifth Circuit's opinion below, the Texas Supreme Court allowed an insurer to intervene in a mandamus action. *See In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718 (Tex. 2006).

[10] *Bituminous Casualty Corp. v. Garcia*, 223 F.R.D. 308 (N.D. Tex. 2004).

[11] *H.B.H. v. State Farm Fire & Casualty Co.*, 170 Ariz. 324, 329-30, 823 P.2d 1332, 1337-38 (Ariz. App. 1991).

[12] *Bridge v. Air Quality Tech. Serv., Inc.*, 194 F.R.D. 3, 6 (D. Me. 1999) ("Since Gulf does not have sufficient interest warranting intervention, the Court, in denying Gulf's motion to intervene on the question of liability, need not consider the other factors necessary for intervention.").

environmental violations. In exchange for a waiver of personal liability, Dingwell entered into a consent decree in which he agreed to pay 65% of the cleanup costs and assigned his rights of indemnification against his insurers to the plaintiffs. Dingwell's insurers, as here, sought to intervene as a matter of right to protect their contingent coverage interests. The district court, as here, denied intervention.

The insurers argued on appeal, as here, that they had an interest in minimizing Dingwell's liability. The First Circuit held that since the insurers had reserved their rights to deny coverage, that interest was contingent. "When the insurer offers to defend the insured but reserves the right to deny coverage, . . . the insured's interest in the liability phase of the proceeding is contingent on the resolution of the coverage issue." *Id.* at 638 (citing cases). The First Circuit also held that the insurers' "coverage" interests were "not related to the subject matter of the action between the Group and Dingwell." *Id.* at 640. In rejecting the same arguments advanced by Allstate here, the First Circuit held that the insurers "did not have a cognizable interest in the subject matter of the lawsuit, and . . . that the district court correctly denied the motions for intervention under Rule 24(a)(2)." *Id.* at 641.

The Second Circuit reached a similar result in 1984. *Restor-A-Dent Dental Labs, Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d 871 (2d Cir. 1984). In that case, as here, Certified's insurer, Unigard, defended under a reservation of rights and sought to intervene in the suit to protect its coverage interests. It sought to intervene "after a general verdict for the plaintiff" so that it could submit questions to the jury to answer its coverage questions. *Id.* at 873-74. The district court denied intervention and the Second Circuit affirmed. The Second Circuit held that Unigard's interest in the amount it would have to pay if the plaintiff won is not related to the subject matter of the action between Restor-A-Dent and Certified. *Id.* at 875. Further, Unigard's interest was contingent on a later finding of liability for indemnification. *Id.* at 876. Because an interest "must be direct, as opposed to remote or contingent," the Second Circuit held that the insurer did not meet the

interest requirement to intervene as a matter of right under Rule 24(a)(2). *Id.; see also Bolden v. O'Connor Café of Worchester*, 50 Mass. App. Ct. 56, 734 N.E.2d 726 (Mass. App. 2000) (denying insurer's post-judgment motion to intervene under Rule 24(a)(2) to appeal a $20 million judgment after insured defendant entered into a covenant not to execute and assignment of claims against his insurer).

The Fifth Circuit attempted to distinguish those opinions in two ways. First, the Fifth Circuit attempted to carve out a difference by saying that in the other cases, the insurer attempted to intervene *before* the judgment. (*See* App. 1, at 25). However, that is a distinction without a difference since, in both other cases, the insurer sought to intervene *after* the liability was determined – in *Travelers*, the insurer's motion to intervene came after the insured's entry into a consent decree,[13] and in *Restor-A-Dent*, the insurers' motion to intervene expressly sought intervention "after a general verdict for the plaintiff, should there be one . . . ."[14] Second, the Fifth Circuit attempted to argue that while in both cases there were contingencies, that the contingencies were less in the present case because the insured's liability had been determined (*See* App. 1, at 25-26). The reason that this so-called distinction makes no sense is that a contingent interest is not sufficient, no matter what the degree, to satisfy the required interest for intervention as a matter of right. *See Vermejo Park Corp. v. Kaiser Coal Corp.*, 998 F.2d 783, 790-791 (10th Cir. 1993) ("The mere existence of a third person's contingent interest in the outcome of pending litigation is insufficient to warrant intervention of right.").

Thus, there is a direct and irreconcilable conflict among the Circuits that requires this Court's resolution.

---

[13] *Travelers*, 884 S.W.2d at 638.

[14] *Restor-A-Dent*, 725 F.2d at 874.

III. Allstate's So-Called "Practical Reasons" To Intervene Are Insufficient To Justify Intervention As A Matter Of Right.

In its brief in opposition, Allstate asserts a number of "practical reasons" to justify intervention as a matter of right. Such "practical" arguments are yet another attempt to blur the limits of intervention. None has merit.

A. Allstate forsook its "contractual interests" when it breached its duty to defend its insured from the judgment.

Interestingly, Allstate begins by arguing that by intervening to appeal the judgment it was merely pursuing its contractual duty to defend Kent Mathews. That is interesting, first of all, because it was not the interest that Allstate asserted in its motion to intervene in the district court—which was to protect its **own** monetary interests (CR 2845). And, when subjected to scrutiny, the argument makes no sense.

Allstate has a duty to defend its insured, Kent Mathews, in the trial court **and** on appeal.[15] However, part and parcel of the duty to defend is the duty to post a full supersedeas bond to protect the insured's assets from execution while the appeal is pending.[16] Without a supersedeas bond to protect the insured's assets from execution while the judgment is being appealed, the duty to defend is illusory. In this case, Allstate breached its duty to defend by refusing to post the full amount of the supersedeas bond. When an insurer breaches its duty to defend, the insured is free to do whatever he must do—including entering

---

[15] *Gibbons-Markey v. Texas Medical Liability Trust*, 163 Fed. Appx. 342, at *4 (5th Cir. 2006) (citing 22 Eric M. Holmes, HOLMES' APPLEMAN ON INSURANCE §136.11 (2d ed. 2003)); *Waffle House, Inc. v. Travelers Indemnity Co. of Illinois*, 114 S.W.3d 601, 611 (Tex. App.—Fort Worth 2003, pet. denied).

[16] *See, e.g., Commercial Casualty Ins. Co. v. Fruin-Colnon Contracting Co.*, 32 F.2d 425, 427-428 (8th Cir. 1929); *Pacific Coast Casualty Co. v. General Bonding & Casualty Ins. Co.*, 240 F. 36, 40-41 (9th Cir. 1917).

into an agreement with the plaintiff, as here—to protect himself.[17]

In this case, the insured did just that. Abandoned by his insurer, Kent Mathews dismissed his appeal and entered into an agreement with the plaintiffs, an agreement that protected his interests while assigning his rights against his insurance company. No, A"state was not acting on behalf of Kent Mathews to protect his interests—he had already protected his interests when Allstate refused to protect him. Allstate was not stepping into his shoes; it was attempting to protect its own.

B. Allstate's "coverage interests" are insufficient to warrant intervention because they are contingent on the resolution of a separate suit.

Another of Allstate's "interest" arguments is that because it may provide coverage, it has an interest in the determination of liability. However, the simple fact is that Allstate will have an interest in liability only IF coverage is found. As noted, numerous courts have held that this contingent interest is insufficient to warrant intervention as a matter of right. *See Travelers Indem. Co. v. Dingwell,* 884 F.2d 629, 640 (1st Cir. 1989) ("This lawsuit involves the apportionment of tort liability, not the respective rights and obligations of an assured and his insurers under their insurance policy . . . [W]e will not allow the insurers to bootstrap their coverage defenses onto this lawsuit.").

C. Allstate's additional expenses or inconvenience is insufficient to warrant intervention as of right.

Finally, Allstate argues that, as a "practical" matter, Allstate's interests are impeded or impaired because litigation in a second lawsuit would result in "more time consuming

---

[17] *Ideal Mut. Insurance Co. v. Myers,* 789 F.2d 1196, 1200 (5th Cir. 1986) ("It is settled that once an insurer has breached its duty to defend, the insured is free to proceed as he sees fit; he may engage his own counsel and either settle or litigate, at his option.").

and costly litigation[18] and further appeals to the Fifth Circuit ..." However, that argument runs contrary to the well-settled rule that if an interest is not "impaired or impeded" if it can be asserted in a separate lawsuit.[19] It is noted once again that Allstate has a separate pending declaratory judgment action in which it can assert the interests that it sought to protect on intervention. It is also well settled that the "mere inconvenience" of the costs and the time to pursue a separate action is "not the sort of adverse practical effect contemplated by Rule 24(a)(2). *See Blake v. Pallan*, 554 F.2d 947, 954 (9th Cir. 1977); *SEC v. Everest Management Corp.*, 475 F.2d 1236, 1239 (2d Cir. 1972).[20]

D. Negligence played no role in this case.

Allstate also tries to make some hay with the argument that because it accepted liability for negligence, it had a direct stake in the judgment. That argument is specious, at best. The jury found no proximate cause, so negligence was not, and could not be, the basis of liability. Instead, the judgment against Kent Mathews was based on liability under a theory of agency, as the Fifth Circuit found when it analyzed the judgment on the merits. (*See* App. 1, at 34-38).

IV. The Fifth Circuit's Opinion Represents Unsound Policy.

There are compelling reasons to grant this petition. First, the opinion below represents extremely bad precedent. By law in every state and federal Circuit, an insurer is duty bound to protect the interests of its insured. The opinion below allows an insurer to forsake those interests. The

---

[18] Of course, defending Allstate's improvident post-judgment intervention in this suit, both in the district court and on appeal, has proved very costly to the original parties to the litigation.

[19] Wright & Miller, *supra* note 1, at §1908 (citing cases which held that the interest was not impaired "when the court finds that the would-be intervenor could protect its interest in a separate action.").

[20] *Id.* ("the practical disadvantage of filing a separate suit and perhaps duplicating some of the efforts of the ongoing litigation are not sufficient to meet the criteria of the rule.").

opinion allows an insurer to wait until a judgment is entered in a suit against its insured and then, if the judgment is adverse, to refuse to post a supersedeas bond to protect its insured's assets, but to intervene itself as a party **as a matter of right**, post-judgment, not to protect the interest of its insured, but to protect its own coverage interests.

Second, the opinion below further conflates the confusion in construction of Rule 24(a)(2). Prior to the opinion below, courts held that an insurer **could not** intervene as a matter of right to protect is own contingent coverage interests. With this opinion, however, the Fifth Circuit has held that some contingent interest is okay. One cannot know, in viewing this turbulent sea of authority, where the definition of "interest" will come to rest.

This Court's intervention is needed to properly define the rule so that courts and litigants know when intervention as a matter of right is proper. The rule cannot be as infinitely elastic as Allstate would suggest. To have any meaning, the rule must have limits. This Court should set those limits.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

THE HOLMAN LAW FIRM, P.C.
David W. Holman
24 Greenway Plaza, Suite 2000
Houston, Texas 77046
Telephone 713.400.4840
Facsimile 713.400.4841

THE HALL LAW FIRM
Benjamin L. Hall III
530 Lovett Boulevard
Houston, Texas 77006
Telephone 713.942.9600
Facsimile 713.942.9566

Counsel of Record for Petitioners